

## **FINAL STATEMENT OF REASONS:**

The California Department of Corrections and Rehabilitation (CDCR) proposes to amend Sections of the California Code of Regulations (CCR), Title 15, Division 3, concerning inmate disciplinary processes.

These regulations bring CDCR into compliance with Penal Code (PC) Section 2932 which dictates that the Department must not assess more than 30 days forfeiture of credit for any "serious" violation of the Departmental regulations; must not assess more than 90 days forfeiture of credit for any misdemeanor offense; must not assess more than 180 days forfeiture of credit for any felony offense, unless the felony is one identified by the Department regulations as an A1 offense, which allows the assessment of up to 360 days forfeiture of credit. Therefore, the Department must not assess more than 30 days forfeiture of credits, unless the violation is either a misdemeanor or felony offense as indicated by the PC. This action clarified and amended CCR Sections that were in violation of this section of the PC.

Additionally, these regulations clarify language which has been found to be vague and in danger of being interpreted incorrectly. The regulations also bring the Department into compliance with ongoing court cases which require the Department to perform certain mandated duties such as employing "effective communication" for the physically & developmentally disabled, or to refrain from certain activities, for those with serious mental health conditions, the recent court decision *In re Dikes (2004) 121 Cal. App.4<sup>th</sup> 825* and existing law, specifically California Penal Code, Section 2932.

The Department seeks to standardize processes concerning inmate discipline that were formerly subject to local interpretation. These amendments will insure the fair and consistent application of the inmate disciplinary process, which will have a positive impact on controlling and rewarding inmate behavior. These changes also further the safety of all persons and the legitimate penological interests of the institutions.

This action amends the current CCR with language which has been rewritten for clarity and easier reference by staff, inmates, and the public in general. Some specific regulatory provisions are retained in virtually unchanged form, while at the same time, new regulatory provisions are added

**Subsection 3000 is amended** to alphabetically merge added definitions with those that exist in the regulations. Additionally, two definitions are deleted as indicated by strikethrough in the text. Controlled Medication was deleted because the definition for Controlled Substance was amended to include prescribed medications identified in California Health and Safety Code Section 11007. Significant work related disciplinary history definition was deleted because the criteria for this definition meets the criteria for the definition of Program Failure in section 3000. Program Failure criteria is utilized by Classification Committees to have an inmate unassigned from his current work/education assignment.

**Subsection 3005(d) is amended** to make this Subsection a major heading of Force or Violence and deletes the paragraph that follows.

**New Subsections 3005(d)(1) through 3005(d)(3) are adopted to** include the language formally located in Subsection 3005(c). The newly adopted Subsections clarify the language regarding an inmate's prohibition from participating in acts of Force or Violence participation in

a Rout, Riot, or unlawful assembly as defined in the PC. The amended language makes specific what is defined as Force or Violence for easier identification for staff and inmates.

**New Subsection 3006(c)(19) is adopted** to include cellular phones in the category of contraband. This language identifies cellular phones as contraband and makes the possession of a cellular phone a violation of this Subsection where there was no specific prohibition regarding the possession of cellular phones in the previous regulations. An inmate in possession of a cellular phone poses a severe safety and security breach to the institution by utilizing the cellular phone for planning an escape and conduct/organize criminal activity.

**Subsection 3008 is amended** to replace the word may with shall. This change makes it clear to staff and inmates that adherence to this rule is mandatory rather than optional.

**Subsection 3009 is amended** to replace the word may with shall. This change makes it clear to staff and inmates that adherence to this rule is mandatory rather than optional.

**Subsection 3011 is amended** to delete the reference to 'State' property in order to give staff and inmates clear directions that inmates must not intentionally destroy, damage or deface any property which would include personal property of another. This amendment to this subsection was not included in the initial rule making action, but was changed as a result of its conflict with changes made in subsection 3323. This amended language was included in a 15 day re-notice in which the public comment period was closed on November 1, 2007 at 5:00 P.M.

**Subsection 3012 is amended** to replace the word may with shall. This change makes it clear to staff and inmates that adherence to this rule is mandatory rather than optional.

**Subsection 3013 is amended** to replace the word may with shall. This change makes it clear to staff and inmates that adherence to this rule is mandatory rather than optional.

**New Subsection 3015(d) is adopted** to include language that makes escape, attempt to escape, or conspiring to escape a violation of this subsection of the CCR. This change is necessary to give staff a consistent rule that will be used to hold inmates accountable for this behavior.

**Subsection 3016(a) is amended** to replace the word may with shall and add the word use. This language is included to make clear that inmates must not use a controlled substance, and is intended to give staff a consistent rule that will be used to hold inmates accountable for this behavior. Additionally the word controlled is deleted. This language is repetitive and unnecessary.

**Subsection 3016(b) is amended** to replace the word may with shall and remove repetitive and unnecessary language.

**Subsection 3016(c) is amended** to remove repetitive and unnecessary language.

**Subsection 3016(d) is amended** to replace the word may with shall and remove repetitive and unnecessary language.

**Existing Section 3290 is renamed** Methods for Testing of Controlled Substances or for Use of Alcohol. This name change was necessary to include the methods for testing for the use of

alcohol by an inmate to this Subsection. Additionally, this change gives staff a consistent direction that will be used to hold inmates accountable for this behavior.

**Subsection 3290(a) is amended to** memorialize the fact that the department shall prescribe the methods and materials used to test for controlled substances and for the use of alcohol. This change further makes it clear that testing will be conducted by trained staff. The staff will receive formal training through their In-Service Training department which will be documented with a certificate of completion placed in the staff members training file.

**Subsection 3290(c) is amended to** include the suspected use of alcohol as a reason for securing a urine sample from an inmate for the purposes of testing.

**Subsection 3290(c)(1) is amended to** include the use of alcohol and will give staff a consistent rule that will be used to hold inmates accountable for this behavior.

**Subsection 3290(d) is amended to** include language requiring inmates to provide a urine sample for the purpose of testing for use of alcohol as well as testing for a controlled substance.

**Subsection 3290(e) is amended to** clarify that seized substances, suspected to be a controlled substance are subject to “field testing” for screening purposes only. It further clarifies that credit loss will not be allowed if the only evidence to support the charge of possession of a controlled substance is a field test.

**Subsection 3290(f) is amended to** clarify the evidence that is needed to support a guilty finding for a violation of this CCR Section. Additionally ‘Alcohol’ is included in the CCR Subsection. This language was necessary to give staff clear direction that must be followed in order to uphold the inmate’s due process rights when charged with a violation described in this Subsection.

**Subsection 3290(g) is amended to** clarify the type of disciplinary action that can be taken when the only evidence used by the hearing official is the result of a field test for violations as noted in 3016(a).

**Existing Subsection 3290(h) is deleted.**

**Subsection 3290(i) is renumbered to 3290(h) and amended to** give staff clear direction in the requirements in identifying medications that are considered to be a controlled substance, per section 3000, and how to assess the level of disciplinary action pursuant to Section 3323.

**Subsection 3310(d) is amended to** correct the use of an acronym.

**New Subsection 3313(a)(1) is adopted to** add language that gives staff clear instructions on processing the CDC Form 804, Notice of Pending 115. This change was necessary due to the absence of direction that resulted in unclear and non-standard practices.

**New Subsection 3313(a)(1)(A) is adopted to** add language that gives staff clear instructions on processing the CDC Form 804, Notice of Pending 115, for parole violators receiving a Rules Violation Report which is designated as a division A, B, or C offense and those who

receive CDC Form 115, Rules Violation Report, for refusing to sign any specific special conditions of parole documents.

**Subsection 3313(c)(2) is amended to** clarify to staff when a Serious Rules Violation Report may be reduced to an Administrative Rules Violation Report by the hearing official. This change was necessary to give clear instruction when conducting a disciplinary hearing.

**Subsection 3313(c)(3) is amended to** clarify to staff when a Serious Rules Violation Report may be reduced to an Administrative Rules Violation Report by the Chief Disciplinary Officer. This change was necessary to give clear instructions concerning the reduction of a Rules Violation Report. Prior language was confusing and resulted in unclear direction.

**New Subsection 3313(c)(4)(C) is adopted to** clarify time constraints which are relative to a re-issued CDC Form 115, Rules Violation Report. This language further clarifies that credit forfeiture may not be taken if the time constraints were violated on the original CDC 115. This language is needed to give those staff members involved in the disciplinary process the specific parameters for handling this type of disciplinary action. The reference “time constraints” was changed to “time limitations” in keeping with section 3320 Hearing Procedures and Time Limitations. This amended language was included in a 2<sup>nd</sup> 15 day re-notice in which the public comment period closed on June 20, 2008 at 5:00 P.M.

**Subsection 3314 (a)(2)(D) is amended to** add use of a controlled substance and adds alcohol to the Subsection. This language will inform staff that a violation of use of these substances, including alcohol, shall not be classified an Administrative Rules Violation.

**Subsection 3314(a)(2)(E) is amended to** exclude the possession of dangerous contraband from being classified as an Administrative Rules Violation.

**New Subsection 3314(a)(2)(F) is adopted to** exclude continued failure to meet program expectations from being classified as an Administrative Rules Violation.

**New Subsection 3314(a)(2)(G) is adopted to** exclude any felony offense from being classified as an Administrative Rules Violation.

**Existing Subsection 3314(a)(3)(A) is deleted.** This language was moved to 3315(a)(3)(B). This move instructs staff to classify a CDC 115 Rules Violation Report for this specific behavior as a Serious Rules Violation.

**Subsections 3314(a)(3)(B) through 3314(a)(3)(L) are renumbered to** 3314(a)(3)(A) through 3314(a)(3)(k) respectively.

**Subsection 3314(e)(2) is amended to** add language that provides an exception to this section and further refers the reader to new subsection 3314(e)(10) for the parameters of this exception. This amendment to this subsection was not included in the initial rule making action, but was changed as a result of the need to provide staff with a viable tool to correct inmate behavior. This amended language was included in a 15 day re-notice in which the public comment period closed on November 1, 2007 at 5:00 P.M.

**New Subsection 3314(e)(10) is adopted to** allow the privilege of possessing an entertainment device in ASU/SHU/ or PSU to be temporarily removed for a period of up to

ninety days as a result of a guilty finding of any Rules Violation Report. Previous language limited the imposition of such privilege restrictions to no more than a thirty day period for an offense designated as administrative. This amendment to this subsection was not included in the initial rule making action, but was changed as a result of the need to provide staff with an additional tool to correct inmate behavior. This amended language was included in a 15 day re-notice in which the public comment period closed on November 1, 2007 at 5:00 P.M.

**Subsection 3315(a)(1) is amended to** clarify the definition of a Serious Rules Violation and includes the specific instruction that criminal prosecution of the offense is not necessary in order to classify the violation as a Serious Rules Violation.

**Subsection 3315(a)(2)(D) is amended to** include the distribution or use of controlled substance, which includes alcohol, to the existing language. This makes it clear that an inmate will be charged with a Serious Rules Violation for this behavior.

**Subsection 3315(a)(3)(B) is amended to** instruct staff to classify a CDC 115 Rules Violation Report for this specific behavior as a Serious Rules Violation. This language was previously located in 3314(a)(3)(A).

**Subsection 3315(a)(3)(F) is amended to** make the distinction between ‘under the influence’ which is based on behavior and ‘use’ which is based on a positive laboratory test.

**Subsection 3315(a)(3)(O) is amended to** correct a grammatical error.

**Subsection 3315(a)(3)(R) is amended to** add that refusing to submit to a test for alcohol is included as a Serious Rules Violation.

**Subsection 3315(a)(3)(V) is amended to** clarify that possession of materials or substances that have been altered or in the process of being modified from their original state into a weapon, explosive, explosive material, or caustic substance is classified as a Serious Rules Violation.

**Subsection 3315(c) is amended to** establish the abbreviation for Senior Hearing Officer (SHO).

**Subsection 3315(d)(1)(A) is amended to** clarify the requirements in which an Investigative Employee must be assigned. This change was needed to standardize the process and give staff a reasonable time frame for the assignment of the Investigative Employee and further designate the classifying official as person who makes the assignment of the Investigative Employee.

**New Subsection 3315(d)(1)(B) is adopted to** give staff clear direction if the inmate chooses to waive the assignment of an Investigative Employee. This change gives staff clear instruction on filling out the CDC 115-A relative to the Investigative Employee waiver, and explains that the classifying official may choose to un-assign an Investigative Employee based on the inmates signed waiver.

**Renumbered Subsection 3315(d)(1)(D) is amended to** clarify the process for the assignment of an alternate Investigative Employee if requested by the inmate. This change was needed to standardize the process in which an Investigative Employee may be

unassigned and an alternate used based on the assignment criteria listed in this section. An inmate's objection to a specific Investigative Employee must be evaluated by the classifying official to determine if the reason for the objection is valid. The reference "valid" was deleted and replaced with "reasonable". This was necessary to remove any confusion on who and what would determine the "objection(s) to be valid". This amended language was included in a 2<sup>nd</sup> 15 day re-notice in which the public comment period closed on June 20, 2008 at 5:00 P.M.

**Subsection 3315(d)(2)(A) is amended to** clarify the requirements of assigning a Staff Assistant and makes the assigning of the Staff Assistant the responsibility of the classifying official.

**New Subsection 3315(d)(2)(B) is adopted to** give staff clear direction concerning the assigning of a Staff Assistant to an inmate upon the discovery of an inmate's need for Effective Communication as defined in Section 3000. The reference "in writing" has been added to establish consistency on how the classifying official will be advised and the words "per section 3315(d)(2)(A)" were added for reference. This amended language was included in a 2<sup>nd</sup> 15 day re-notice in which the public comment period closed on June 20, 2008 at 5:00 P.M.

**New Subsection 3315(d)(2)(E)(1) is adopted to** prohibit inmates who are participants in the Mental Health Services Delivery System at the level of Enhanced Outpatient Program, Mental Health Crisis Bed, Department of Mental Health, or Developmentally Disabled Program participants at the level of DD1 to DD3 from waiving or refusing a Staff Assistant during a disciplinary hearing process.

**New Subsection 3315(d)(2)(F)(1) is adopted to** ensure that the assigned Staff Assistant must be present during any questioning for inmates who are assigned both a Staff Assistant and an Investigative Employee during the disciplinary process.

**Subsection 3315(e)(4) is amended to** give staff clear direction concerning the presence of the reporting employee at the disciplinary hearing at the inmates request, either in person or by telephone. Additionally, this change will make it mandatory that if the telephone is used during the disciplinary hearing, it must have speaker capabilities.

**Subsection 3315(e)(5) is amended to** make it the responsibility of the Senior Hearing Officer to screen all questions presented by the inmate to ensure they are relevant to the violation charged.

**Subsection 3315(e)(6) is amended to** allow the interview of witnesses by speaker phone during the disciplinary hearing. This method is often utilized if the witness is a staff member and will be off work for a substantial time before they return to work.

**Subsection 3315(f)(2) is amended to** instruct staff that a Serious Rules Violation may be reduced, as opposed to reclassified, to an administrative level offense violation and the inmate may be assessed only a disposition authorized in section 3314. This change makes the distinction clear between 'reduced' and 'reclassified'.

**Subsection 3315(f)(4)(C) is amended to** make it mandatory for the inmate to provide a minimum of four random drug tests per month for one year after the third and all subsequent offenses if the violation included an act related to the use, possession, or distribution of

controlled substances, controlled medication, drugs or drug paraphernalia; or if the inmate refused to submit to a test for controlled substances or drugs.

**Subsection 3315(f)(5)(B) is amended to** clarify that an inmate will lose specific privileges for violations of sections 3016(a), 3016(c) and 3290(d). Previous language referenced Subsections 3323(c) and 3323(d). These Subsections describe what the specific offense will be classified as, and not the offense itself.

**Subsection 3315(f)(5)(D) is amended to** clarify that an inmate will be confined to quarters or placed in disciplinary detention for violations of sections 3016(a), 3016(c) and 3290(d). Previous language referenced Subsections 3323(c) and 3323(d). These Subsections describe what the specific offense will be classified as, and not the offense itself.

**Existing Subsection 3315(f)(5)(F) is deleted** due to the incorrect reference to Subsection 3323(c)(7) and 3323(d)(6). Both Subsections describe what the specific offense will be classified as, and not the offense itself. Additionally, all felonies for parole violators are now referred to the District Attorney as required by Valdivia vs. Schwarzenegger.

**Existing Subsection 3315(f)(5)(I) is renumbered to 3315(f)(5)(H) and amended to** clarify that an inmate will lose contact visiting for a period of one year and will be placed on non-contact visitation for a period of two years if found guilty for violations of Subsection 3016(c). Previous language referenced Subsection 3323(c)(7). Subsection 3323(c)(7) describes what the specific offense will be classified as, and not the offense itself.

**Existing Subsection 3315(f)(5)(J) is renumbered to 3315(f)(5)(I) and amended to** clarify that possession of alcohol will not be included in the loss of visitation described in this section and adds the violation of Subsection 3290(d), refusal to submit to a urinalysis, to the visiting restriction. Additionally, previous language referenced Subsections 3323(d)(6). Subsection 3323(d)(6) describes what the specific offense will be classified as, and not the offense itself which is 3290(d).

**Existing Subsection 3315(f)(5)(K) is renumbered to 3315(f)(5)(J) and amended to** replace previous language that referenced Subsections 3323(c)(7) and 3323(d)(6). Both Subsection 3323(c)(7) and Subsection 3323(d)(6) describe what the specific offense will be classified as, and not the offense itself.

**New Subsection 3315(f)(5)(L) is adopted to** give staff clear direction to allow the privilege of possessing an entertainment device in ASU/SHU/or PSU to be temporarily removed for a period of up to ninety days as a result of a guilty finding of any Rules Violation Report. This amendment to this subsection was not included in the initial rule making action, but was changed as a result of the need to provide staff with an additional tool to correct inmate behavior. This amended language was included in a 15 day re-notice in which the public comment period closed on November 1, 2007 at 5:00 P.M.

**Section 3317 is amended to** bring the department into compliance with the Coleman vs. Schwarzenegger Revised Program Guide which requires all inmates at the EOP, MHCB, and DMH level of care, who receive a CDC 115, Rules Violation Report shall be referred for a Mental Health Assessment. All inmates in CCCMS or non-MHSDS inmates who receive a CDC 115 Rules Violation Report, and who exhibit bizarre, unusual or uncharacteristic behavior at the time of the rules violation shall be referred for a Mental Health Assessment. Previous language limited the use of a CDC 115 MH for inmates who were suspected of self mutilation

or attempted suicide. The amendment to this subsection was not included in the initial rule making action, but was changed as a result of the issue being raised in the public comment period. This section was deemed out of compliance and subsequently amended. This amended language was included in a 15 day re-notice in which the public comment period closed on November 1, 2007 at 5:00 P.M.

**Subsection 3318(a) is amended to** clarify the role of the Investigative Employee as a fact finder for the Senior Hearing Officer or a disciplinary committee. The reference “as a fact finder” was deleted and replaced with “to gather information”. This was necessary to describe an Investigative Employees (IE) primary function as well as when and under what circumstances an employee shall be assigned as an IE in keeping with section 3315(d)(1)(A). The words “per section 3315(d)(1)(A)” were added for reference. This amended language was included in a 2<sup>nd</sup> 15 day re-notice in which the public comment period closed on June 20, 2008 at 5:00 P.M.

**Subsection 3318(a)(1)(E) is amended to** give the Investigative Employee specific instructions regarding the reporting requirements during the investigative employee process.

**Subsection 3318(b)(2)(A) is amended to** remove the requirement that an inmate must request the confidentiality during the staff assistance process. This clarifies the requirement to keep the information confidential regardless of the inmate request.

**Subsection 3318(b)(2)(B) is amended to** inform staff and inmates that any information used in a disciplinary hearing is subject to being used if the case is referred for criminal prosecution.

**Subsection 3320(a) is amended to** bring the regulations into compliance with PC section 2932 which requires the “notice of charges” (CDC Form 115, Rules Violation Report and any additional/supplemental information) be issued to the inmate within 15 days of the date of discovery of information leading to the charge. This change will clarify the mandated time frames and remove confusing language that had the potential of being interpreted incorrectly. The reference “per section 3313(a)” was added for clarity and describes the process of classifying a CDC 115 as either Administrative or Serious. This amended language was included in a 2<sup>nd</sup> 15 day re-notice in which the public comment period closed on June 20, 2008 at 5:00 P.M.

**Subsection 3320(a)(1) is amended to** give staff direction that the issuance of a classified CDC 115, Rules Violation Report may be delayed beyond 15 days but must not be delayed more than 45 days. This change also gives staff direction that if the Classified CDC 115, Rules Violation Report is issued beyond 15 days, the delay shall not prohibit forfeiture of credit as a penalty for the misconduct when specific criteria outlined in this section are met.

**New Subsection 3320(a)(2) is adopted to** clarify time frames for a re-issued CDC 115, Rules Violation Report as commencing on the date the Chief Disciplinary Officer orders the CDC 115, Rules Violation report re-heard pursuant to 3320(a)(1). The reference “time constraints” was changed to “time limitations” in keeping with section 3320 Hearing Procedures and Time Limitations. This amended language was included in a 2<sup>nd</sup> 15 day re-notice in which the public comment period closed on June 20, 2008 at 5:00 P.M.



**Subsection 3320(b) is amended to** clarify that a hearing will be held within 30 days of the inmate's receipt of the Classified CDC 115, Rules Violation Report unless exceptional circumstances that are beyond the inmate's or the Department's control exist.

**New Subsection 3320(b)(1) is adopted to** give staff direction that a hearing for a re-issued/re-heard CDC 115, Rules Violation Report shall be conducted within 30 days of the inmate's receipt of the Classified CDC 115, Rules Violation Report unless exceptional circumstances that are beyond the inmate's or the Department's control exist. Prior language concerning these time frames was unclear and confusing to staff.

**Subsection 3320(c)(1) is amended to** make it clear that a disciplinary hearing shall not be held until the inmate has been provided a classified copy of the CDC Form 115, Rules Violation Report and all non-confidential reports containing information relative to the charge. This change will ensure the inmates due process rights.

**Subsection 3320(d) is amended to** give the staff and inmates the direction for requesting the postponement of a hearing. The inmate must submit a written request that will be evaluated by the Chief Disciplinary Officer, who will then make a determination on the merit of the request. The word "merit" was deleted and replaced with "credibility" to clarify that evidence presented by the inmate establishes the reasonable need for postponement which can be verified. This amended language was included in a 2<sup>nd</sup> 15 day re-notice in which the public comment period closed on June 20, 2008 at 5:00 P.M.

**Subsection 3320(f)(3) is amended to include** exceptional circumstances which are beyond the inmate or Department's control in the preclusion of the denial or forfeiture of credits. Previous language did not include any explanation of exceptional circumstances.

**Subsection 3320(f)(5) is amended to** add the word 'exceptional' and replaces 'extraordinary' in order to remain consistent with the language used throughout this section.

**Subsection 3320(g)(3) is amended to** give staff clear direction regarding the approved reasons for the inmate's absence during a disciplinary hearing. This change clarifies the process of documenting the inmate's refusal to participate in the disciplinary hearing. This documentation will ensure the due process right of the inmate is upheld.

**Subsection 3323(a) is amended to** include inmates who are serving an indeterminate term. Prior language was exclusive and insufficient to encompass all inmates who meet the criteria. The reference "indeterminate life term" was deleted and replaced with "Indeterminate Sentence Law (ISL) as defined in section 3000" which establishes consistency with section 3000 and Penal Code 1170.2. This amended language was included in a 2<sup>nd</sup> 15 day re-notice in which the public comment period closed on June 20, 2008 at 5:00 P.M.

**Subsection 3323(b)(4) is amended to** replace the words "attempted battery" with "Assault" This language is changed for clarity and compliance with language in the PC in that there is no such violation of "Attempted Battery" listed in the PC.

**Subsection 3323(b)(8) is amended to** add "attempted manufacture" as a chargeable offense in this category. This brings a violation of this offense in line with the PC language.

**New Subsection 3323(b)(9) is adopted to** add “solicitation to commit an offense listed in subsections 3323(b)(3), (b)(4) or (b)(5)” to the Section as a Division A-1 offense. This brings a violation of this offense in line with the PC section 653f.

**Subsection 3323(c)(1) is amended to** add “causing serious bodily injury” to the offense of Arson listed in this Subsection. This addition of language brings this Subsection into compliance with language in the PC.

**Subsection 3323(c)(3) is deleted.** This language was moved to Subsections 3323(b)(9) and 3323(c)(9).

**Subsection 3323(c)(7) is renumbered to 3323(c)(6) and amended to** make the “introduction” of a controlled substance as defined in Section 3000, an A-2 offense. Previous language limited the offense to “distribution of a controlled substance” only.

**New Subsection 3323(c)(7) is adopted to** add “extortion by means of force or threat” to this Section and makes a violation of this nature an A-2 offense. This felony level offense exists in the PC, but was not previously captured in this Section.

**Existing Subsection 3323(c)(8) remains unchanged.**

**New Subsection 3323(c)(9) is adopted to** add “solicitation to commit an offense listed in subsections 3323(c)(1) or (c)(7)” to the Subsection as a Division A-2 offense. This addition of language brings this Subsection into compliance with language in the PC.

**Subsection 3323(d)(1) is amended to** remove “Attempted Battery”. This language is changed for clarity and compliance with language in the PC in that there is no such violation for Attempted Battery listed in the PC.

**New Subsection 3323(d)(2) is adopted to** add “Assault on a peace officer by any means likely to cause great bodily injury”. This change will bring this section into compliance with PC section 245(c) and will give staff clear direction in holding inmates accountable for this type of behavior.

**Existing Subsection 3323(d)(2) is renumbered to 3323(d)(3) and amended to** remove “Attempted Battery”. This language is changed for clarity and compliance with language in the PC in that there is no such violation for Attempted Battery listed in the PC.

**Existing Subsection 3323(d)(3) is renumbered to 3323(d)(4) and amended to** expand this Subsection to mirror the PC language regarding public officials.

**Subsection 3323(d)(5) is renumbered to 3323(d)(6) and amended to** clarify existing language regarding personal property. Prior language was vague and/or redundant.

**Subsection 3323(d)(6) is renumbered to 3323(d)(7) and amended to** delete redundant language in that the words “control” and “possession” are interchangeable in this Subsection . This change also adds a reference to the definition of a controlled substance in Section 3000 for ease of identification.

**New Subsection 3323(d)(11) is adopted to** add “solicitation to commit an offense listed in Subsections 3323(d)(1) or 3323(d)(2)” to the Subsection as a Division B offense.

**Subsection 3323(e)(3) is deleted.** A definition of the items contained in this language is now located in Section 3000 for ease of identification. The remaining descriptive language was moved to 3323(h)(7), making the possession of this type of material a Division F offense.

**Subsection 3323(e)(5) is renumbered to 3323(e)(4) and amended to** add clarifying language concerning attempted extortion.

**Existing Subsection 3323(e)(7) is deleted** due to redundancy of some language. The remaining language is captured in new Subsection 3323(e)(13).

**New Subsection 3323(e)(9) is adopted to** expand and clearly define “Drug Paraphernalia” with a reference to Section 3000 and makes the possession of this paraphernalia a Division C offense. This is consistent with the PC in that unauthorized possession of Drug Paraphernalia is a felony.

**Subsection 3323(e)(11) is renumbered to 3323(e)(10) and amended to** delete references to the manufacture of a distilled material consistent with alcohol. The language retained in this Subsection clarifies the offense as physical possession of alcohol.

**New Subsection 3323(e)(11) is adopted to** add the act of accessory to any felony offense punishable as a Division C offense. This addition of language brings this Subsection into compliance with language in the PC.

**New Subsection 3323(e)(13) is adopted to** add “solicitation to commit an offense listed in Subsections 3323(e)(5), 3323(e)(6) or 3323(e)(7)” to the Subsection as a Division C offense.

**New Subsection 3323(f)(1) is adopted to** clarify that use of a controlled substance (except marijuana and barbiturates) based solely on a positive test result is a Division D offense. This section also states that the test result relied upon must be a Departmental approved testing method. This language is adopted to bring the Department into compliance with the PC regarding use of a controlled substance.

**Existing Subsection 3323 (f)(1) is renumbered to 3323(f)(2) and amended to** make being under the influence of a controlled substance, as defined in Section 3000, a Division D offense. This language clarifies that under the influence is based on behavior, as opposed to use as described in 3323 (f)(1) above, which is based on a positive test result.

**Existing Subsection 3323(f)(2) is deleted.** This deleted language is included in the description of Drug Paraphernalia in Section 3000, moved to Subsection 3323(e)(9) listed as a Division C offense. This change brings the Department into compliance with the PC.

**Subsection 3323(f)(8) is amended to** replace “Attempted Battery” with Assault. This language is replaced for clarity and compliance with language in the PC in that there is no such violation for “Attempted Battery” listed in the PC.

**Subsection 3323 (f)(9) is adopted to** change the term “Mutual Combat” to “Fighting”. This change will provide staff with a more clear and common term for this violation. Additionally, the term “Mutual Combat” is not used in the PC.

**New Subsection 3323(f)(10) is adopted to** include the assault of a peace officer by any means not likely to cause great bodily injury to the subsection as a Division D offense. This language exists in the PC but was not clearly captured in the CCR.

**New Subsection 3323(f)(12) is adopted to** add the solicitation to posses, distribute, or introduce a controlled substance into an institution or contract health facility a Division D offense. This change will bring the Department into compliance with the PC.

**Subsection 3323(g)(1) is amended to** separate the subsection into two types of violations. Theft, embezzlement, destruction, and damage to another’s property remain listed as a Division E offense. While misuse, alteration, unauthorized acquisition, or exchange is moved to Subsection 3323(h)(4) and listed as a Division F offense.

**Subsection 3323(g)(2) is amended to** remove the word “manufacture” from this Subsection. This change is consistent with the PC.

**Existing Subsections 3323(g)(7)(A), (B) and (C) are deleted** from this section. The language in 3323(g)(7)(A) and 3323(g)(7)(B) is moved to Subsection 3323(h)(9)(A) and 3323(h)(9)(B), making these violations Division F offenses. Prior classification of these violations as Division E offences was inconsistent with the PC, in that the violation is not listed as a misdemeanor. The language previously contained in 3323(g)(7)(C) is deleted due to redundancy with 3323(g)(7)(A).

**Subsection 3323(g)(9) is renumbered to 3323(g)(8) and amended to** delete language that is unnecessary and potentially confusing.

**New Subsection 3323(g)(10) is adopted to** add “solicitation to commit an offense listed in Subsections 3323(g)(4) or 3323(g)(7)” to the Subsection as a Division E offense. This change is consistent with PC language.

**New Subsection 3323(h)(3) is adopted to** bring the Department into compliance with the PC as it pertains to the use of marijuana, barbiturates, or alcohol based solely on a positive test result in that this behavior is listed as a misdemeanor.

**New Subsection 3323(h)(4) is adopted to** make the misuse, alteration unauthorized acquisition or exchange of personal property, state funds or state property a violation classified as a Division F offense.

**New Subsection 3323(h)(5) is adopted to** include the refusal to provide a urine sample for the purpose of testing for the presence of a controlled substance or alcohol to this Subsection. This language was previously located in 3323(f)(1), which designated it as a Division D offense. This classification was inconsistent with language in the PC.

**New Subsection 3323(h)(6) is adopted to** distillation or fermentation of a material consistent with alcohol. The language was moved from Subsection 3323(e)(11) and further clarifies the

offense as the manufacture of alcohol as opposed to the physical possession of alcohol. This change brings this section into compliance with the PC.

**New Subsection 3323(h)(7) is adopted to** add the possession of dangerous contraband as described in Section 3000 to this Subsection. This language was moved from Subsection 3323(e)(3) and brings this section into compliance with the PC.

**New Subsection 3323(h)(8) is adopted to** include the possession or distribution of medication, which is not defined as a Controlled Substance per Section 3000, to this Subsection.

**New Subsection 3323(h)(9) is adopted to** add Work Related offenses to this Subsection. This language was moved from 3323(g)(7) and brings the Department into compliance with the PC in that the violations listed here are not listed as misdemeanors.

**New Subsection 3323(h)(9)(A) is adopted to** add refusal to work to this Subsection. This language was moved from 3323(g)(7)(A) and brings the Department into compliance with the PC in that the violation listed here are not listed as misdemeanors.

**New Subsection 3323(h)(9)(B) is adopted to** add “continued failure to perform work or assigned duties” to this Subsection. This language was moved from 3323(g)(7)(B) and brings the Department into compliance with the PC in that the violations listed here are not listed as misdemeanors.

**Existing Subsection 3323(h)(3) is renumbered to 3323(h)(10) and is amended to** add clarity to existing language.

**Subsection 3327(a)(2) is amended to** add clarifying language to the existing language. This change will aid staff in determining the specific criteria in this subsection.

**Subsection 3327(a)(4) is amended to** add language that starts a listing of specific instances where no credit will be restored in the cases that follow this subsection. This change also separates portions of existing 3327(a)(4) language into a new Subsection of 3327(a)(4)(A) below.

**New Subsection 3327(a)(4)(A) is adopted** using language from the existing subsection above to outline clear instructions and criteria for the preclusion of Restoration of Forfeited Credits for inmates who are found guilty of use of a controlled substance, marijuana, or alcohol based on a positive test result. This language gives staff clear direction and will eliminate confusion concerning this type of credit.

**New Subsection 3327(a)(4)(B) is adopted** using language from the existing Subsection 3327(a)(4) to outline clear instructions and criteria for the preclusion of Restoration of Fortified Credits for inmates who are found guilty of refusal to submit to a drug test pursuant to Subsection 3290(c). This language gives staff clear direction and will eliminate confusion concerning this type of credit.

**New Subsection 3327(a)(4)(C) is adopted** to outline clear instructions and criteria for the preclusion of Restoration of Fortified Credits for inmates who are found guilty of the distillation

or fermentation of a material consistent with alcohol. This language gives staff clear direction and will eliminate confusion concerning this type of credit.

**New Subsection 3327(a)(4)(D) is adopted** to outline clear instructions and criteria for the preclusion of Restoration of Fortified Credits for inmates who are found guilty of unauthorized possession of dangerous contraband as defined in section 3000. This language gives staff clear direction and will eliminate confusion concerning this type of credit.

**Subsection 3328(a) is amended to** clarify that the commencement time of a disciplinary free period is immediately following the date and time the inmate is identified as committing a Rules Violation. Prior language was vague and had the potential of being interpreted inconsistently.

**Subsection 3328(b) is amended to** clarify that the inmate may apply for the restoration of credits for Division D or E offenses provided that they are not listed in Subsection 3327. This language was added for further clarification of an existing rule. This section is also amended to change the term “six months” to “180 days” for clarity and consistency. This amended language was included in a 2<sup>nd</sup> 15 day re-notice in which the public comment period closed on June 20, 2008 at 5:00 P.M.

**Subsection 3328(b)(1) is amended to** change the term “six months” to “180 days” and the term “two months” changed to “60 days” for clarity and consistency. The reference “the entire period and at least” was deleted as this change was not needed and is to revert back to the original language currently in subsection 3328(b)(1). This amended language was included in a 2<sup>nd</sup> 15 day re-notice in which the public comment period closed on June 20, 2008 at 5:00 P.M.

**Subsection 3328(c) is amended to** clarify that the inmate may apply for the restoration of credits for a Division F offense provided that it is not listed in Subsection 3327. This language was added for further clarification of an existing rule. This section is also amended to change the terms “three months” to “90 days” and “one month” to “30 days” for clarity and consistency. The reference “the inmate has” was deleted as the change was not needed and is to revert back to the original language in subsection 3328(c). This amended language was included in a 2<sup>nd</sup> 15 day re-notice in which the public comment period closed on June 20, 2008 at 5:00 P.M.

**Subsection 3328(c)(1) is amended to** change the term “three months” to “90 days” and the term “one month” changed to “30 days” for clarity and consistency. The reference “the entire period and at least” was deleted as this change was not needed and is to revert back to the original language currently in subsection 3328(c)(1). This amended language was included in a 2<sup>nd</sup> 15 day re-notice in which the public comment period closed on June 20, 2008 at 5:00 P.M.

#### **DETERMINATION:**

The Department has determined that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective and less burdensome to affected persons.

#### **ASSESSMENTS, MANDATES, AND FISCAL IMPACT:**

This action will neither create nor eliminate jobs in the State of California, nor result in the elimination of existing businesses, or create or expand businesses in the State of California.

The Department, in proposing amendments to these regulations, has identified the recent court decision *In re Dikes* (2004) 121 Cal. App.4<sup>th</sup> 825 and existing law, specifically California Penal Code, Section 2932 as documents relied upon to support the changes to these regulations.

The Department determines this action imposes no mandates on local agencies or school districts; no fiscal impact on State or local government, or Federal funding to the State, or private persons. It is also determined that this action does not affect small businesses nor have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states because they are not affected by the internal management of State prisons; or on housing costs; and no costs or reimbursements to any local agency or school district within the meaning of Government Code Section 17561.

### **PUBLIC HEARING COMMENTS:**

#### **Public Hearing: Held September 11, 2007 at 10:00 a.m.**

No one commented at the Public Hearing.

### **SUMMARIES AND RESPONSES TO WRITTEN PUBLIC COMMENTS:**

#### **Commenter #1:**

**Comment A:** Commenter contends that the term “unlawful assembly” used in Section 3005(c)(3) is vague. According to the commenter this term could describe two or three inmates playing cards while a sit down strike or work stoppage is going on could be used to fit this term. Commenter states that this regulatory language does not give a person enough information to determine what is prohibited.

**Accommodation: None.**

**Response A:** The department contends that the term Unlawful Assembly is defined in PC section 4097 as “Whenever two or more persons assemble together to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly”. Any guilty finding of a rules violation for “unlawful assembly” pursuant to this CCR Section will have to meet this definition. Additionally this information in the Penal Code is included in training for staff and can be found in the law library which is accessible for inmates regardless of housing assignment. The commenter’s example of two or three inmates engaged in a card game being viewed as unlawful by staff would not be considered unlawful by this PC section without some other actions clearly stated in this definition.

**Comment B:** Commenter states that Section 3315(f)(5)(K) which requires that inmates found guilty of specified Rules Violations attend Alcoholic anonymous or Narcotics anonymous, or be assigned to an alternative substance abuse education program where available is unacceptable. According to the commenter there is a lack of “alternate programs” other than Alcoholics and Narcotics Anonymous which, according to the commenter are “religious” programs. Commenter contends that “forced” participation in a Christian program violates his constructional rights.

**Accommodation: None.**

**Response B:** The department contends that this language is not amended in this regulatory action. This regulatory language was adopted consistent with the Administrative Procedures Act in a previous rule making action and therefore is not open for comment during this regulatory action.

#### **Commenter #2:**

**Comment A:** Commenter contends that the designation of an investigative employee as a fact finder for the Senior Hearing Officer per CCR section 3318(a) is flawed in that Correctional Officers are not properly trained in collecting facts.

**Accommodation: None.**

**Response A:** The department contends that all Correctional Officers are given training in the inmate disciplinary processes in the Basic Correctional Officers Academy. Additionally Correctional Officers who are given the assignment as an Investigative Employee are assigned by a supervisor who is responsible to ensure proper guidelines and procedures are followed in this process.

**Comment B:** Commenter states that he understands that according to new language contained in 3315(f)(2) a Senior Hearing Officer can reduce a Rules Violation Report from a A1/A2 or a B level offense to an F offense. Commenter asked where it is stated that this is not allowed.

**Accommodation: None.**

**Response B:** The department contends that this commenter has misinterpreted the amended language. 3315(f)(2) states that as a result of a guilty finding the SHO may reduce a Serious Rules Violation Report to an Administrative Rules Violation Report and may only assess the disposition authorized in 3314. Section 3314(a)(1) through 3314(2)(E) designate what can be classified as an Administrative Rules Violation Report. The department further contends that Rules Violation Reports classified at A1/A2 or B do not meet the criteria for classification as an Administrative level offense and therefore can not be reduced to this level as a result of a guilty finding. Additionally 3315(a)(1) through 3315(a)(1)(X) denotes the criteria and type of offenses that shall be designated as a Serious Rules Violation Report.

**Comment C:** Commenter asks if the department took into account how the change to Section 3043.6(3)(A)(D) would affect the life term inmates incarcerated in the prisons under the jurisdiction of the department. According to commenter this action places life term inmates last on the list to obtain a work assignment.

**Accommodation: None.**

**Response C:** The department contends that section 3046.3 was not amended in this rule making action. Changes to section 3043.6 were adopted in accordance with the Administrative Procedures Act in a previous and unrelated rulemaking action. Therefore this comment can not be responded to during this rulemaking action.

**Commenter #3:**

**Comment A:** Commenter, who has submitted a comment and an attached signature page containing 219 signatures, and a copy of a court ruling case number 00W0086A, Superior Court Kings County, contends that the proposed changes to the regulations regarding alcohol, and the testing for the use of alcohol was placed in the regulations due to several court rulings in which the Rules Violation Reports in question were dismissed due to staff's failure to test the suspected alcohol.

**Accommodation: None.**

**Response A:** Although the commenter does not give specific section numbers in order to identify which section he is discussing, the department believes the commenter is discussing Sections 3290(a) and 3290(c). Therefore the department contends this specific regulatory change was not motivated by the court ruling which the commenter included in the public comment. The ruling provided by commenter was specific to one inmate's case. The Kings County Court ruled in favor of petitioner due to the lack of corroboration by any other staff member that the substance seized had the properties of alcohol. In this case the type of testing/verification used to determine whether the substance was fermented was what was questioned. The court ruled that in this specific case the inmate's credits be restored. The department further contends that the regulatory change in this section was done to clarify that the department has the authority to secure a urine sample from an inmate who was observed and suspected of being under the influence of alcohol.



**Comment B:** Commenter contends that the regulatory language should be made retroactive, in that the change to the regulations now prohibit the assessment of credit loss when the suspected substance has not been tested. According to the commenter this retroactive application should be implemented after a 90 day grace period in which inmates would be required to request in writing to have their credits restored. The commenter states that this process would assist in the overcrowding of CDCR institutions.

**Accommodation: None.**

**Response B:** Again the commenter does not give specific section numbers in order to identify which section he is discussing. The department contends that the regulatory language in 3290(a) and 3290(c) was included into this regulatory action to give staff clear direction regarding the testing standard for suspected use of alcohol, and that the department can prescribe the type of methods used. Prior regulations did not give staff the authority to secure a urine sample from an inmate who was observed and suspected of being under the influence of alcohol. Staff observations of an inmate who is suspected of being impaired is authorized by the "reasonable cause" standard as captured in 3290(c)(1) of the proposed regulations. The department points out to the commenter that section 3290(a) does not speak to the testing of the substance itself. Section 3290(a) states that the methods, products, and equipment are prescribed by the department. Also clarified in this section is the mandate that staff shall be trained in the identification of suspected alcohol. The department further points out that according to existing regulation section 3290(g), the loss of credit can not be assessed unless there is a preponderance of evidence which includes more than the result of a field test. Therefore the evidence standard in the possession of alcohol has not changed and the restoration of credits will not be appropriate as a wholesale action. If an inmate believes that he/she has been adversely affected by a guilty finding of an Rules Violation Report of this nature, they may file an inmate appeal regarding his/her specific case factors.

**Commenter #4:**

**Comment:** Commenter asked a specific question regarding whether two D cell batteries placed in a sock with the sock tied in a knot constitutes dangerous contraband as defined in section 3000. Commenter further contends that he was placed in Administrative Segregation for possession of this type an item.

**Accommodation: None.**

**Response:** The Department contends that although the above comment does regard an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to Government Code Section 11346.9(a)(3), the comment is insufficiently related to the specific action or actions proposed to the extent that no meaningful response can be formulated by the department in refutation of or accommodation to the comment.

**Commenter #5:**

**Comment:** Commenter asks the department for advisement as to when the proposed regulations will be in affect.

**Accommodation: None.**

**Response:** Once certified by the Office of Administrative Law, this regulatory action will be placed in the California Regulatory Notice Register, and will be in permanent effect upon filing with the Secretary of State. The department will send notification that the regulations have been adopted to all institutions and parole offices.

**Commenter #6:**

**Comment:** Commenter, who is class counsel for plaintiffs in Coleman v. Schwarzenegger contends that revisions to section 3317, Mental Health Evaluations was overlooked and the current language is in conflict with the March 3, 2006 Revised Program Guide as ordered by the court. According to the commenter, current section 3317, Mental Health Evaluations does not reflect the requirement that all inmates at the Enhanced Outpatient Program (EOP), Mental Health Crisis Bed (MHCB), and Department of Mental Health (DMH) level of care, who receive a CDC 115, Rules Violation Report, shall be referred for a Mental Health Assessment. Additionally all inmates in Correctional Clinical Case Management System (CCCMS) or non-Mental Health Services Delivery System (MHSDS) inmates who receive a CDC 115 Rules Violation Report, and who exhibit bizarre, unusual or uncharacteristic behavior at the time of the rules violation shall be referred for a Mental Health Assessment. Existing language in CCR Section 3317 limits the mental health evaluations to inmates who are suspected of self mutilation or attempted suicide.

**Accommodation: Yes.**

**Response:** The Department agrees with the commenter and thanks the Prison Law Office and plaintiff's counsel for pointing out this deficiency in the proposed regulations. Section 3317 was not originally amended in this rulemaking action but is clearly related to the subject of Inmate Discipline. Therefore section 3317 has been amended to include the specific requirements as ordered by the court. The changes were included in the 15 day re-notice that closed on November 1, 2007 at 5:00 pm.

**Commenter #7:**

**Comment #1:** Commenter states that in regard to proposed section 3015(d) "prisoners should still retain notice of defense to escape as delineated in CALIIC Jury Instructions/case law".

**Accommodation: None.**

**Response #1:** The Department contends that there is not enough information contained in this comment for the department to formulate a response.

**Comment #2:** Commenter contends that the department is attempting to change the burden of proof to sustain guilt for a Division B level offense by the proposed changes to section 3290(f). Commenter further states that case law, In re Dykes, has previously made positive test results a Division F offense.

**Accommodation: None.**

**Response #2:** The department contends that the Dykes case was specific to positive test results for marijuana only. A positive test result would be evidence of "use" of a controlled substance as defined in Subsection 3000. Use of specific controlled substances is still a misdemeanor offense as outlined in the Penal Code incorporating Health and Safety Section 11550, which lists the subsections identifying the specific controlled substances that apply to this section.

**Comment #3:** Commenter contends that "Fighting" as listed in 3323(f)(9) is not a known crime and is therefore not punishable beyond a Division F offense.

**Accommodation: None.**

**Response #3:** The department contends that Penal Code Section 415, Fighting; noise; offensive words, is the authority used to support this level of offense.

**Commenter #8**

**Comment A:** Commenter contends that the Initial Statement of Reasons fails to provide a citation or reference to the proceeding or court action which found these regulations vague and thus invalid. Commenter further requests that the Notice of Change to Director's Rules be amended to include the

citation or court ruling regarding these proposed regulations. Commenter also requests that the “note” section of the proposed regulations include the citation or court ruling. Additionally the commenter requests that the department amend these areas and republish an amended Notice of Change to Regulations.

**Accommodation: None.**

**Response A:** The department contends that the Initial Statement of Reasons is structurally sound and that the necessity has been clearly identified. Additionally in response to the comment regarding the notice in the California Regulatory Notice Registry, the department has reviewed the Notice and is content that it complies with the legal standard that is set in Government Code 11346.5.

**Comment B:** Commenter contends that the proposed regulations will affect the amount of time credit loss assessed to past and future prisoners for rules violations. Commenter further states that in the past corrections officials have assessed more time credit loss than was allowed under Penal Code Section 2932. Commenter requests that all prisoners who have had time loss assessment illegally imposed shall have time credit corrected retroactively. Commenter also requests that the Final Statement of Reasons include the procedure in which this restoration shall be completed.

**Accommodation: None.**

**Response B:** The department contends that the date the regulations are permanently adopted controls future actions of the Department. Further, existing department regulations provided for credit loss prior to this regulation change. If an inmate felt it was outside the boundaries of the Penal Code, they have the opportunity to address the matter through the appeals process. Such individual cases have already been addressed this way.

**Comment C:** Commenter references comment #2 and states that the proposed amendments to the regulations will result in a need to correct time credit loss causing inmates to remain in prison for shorter periods of time. Commenter states for this reason the Notice is incorrect in the following areas:

- **Fiscal Impacts.** According to the commenter there will be a fiscal impact in that inmates will serve less time incarcerated and CDCR will save the cost in warehousing inmates. Commenter further contends that this will have a nondiscretionary cost on local agencies due to more prisoners being released thereby increasing the cost to local parole departments.
- **Effects on Housing costs.** Commenter states that depending on the amount of prisoners released sooner there will be a corresponding amount of Parolees seeking housing. Commenter contends that more houses and condominiums will be bought and that this increase demand for housing will increase the cost of housing.
- **Cost Impact on Representatives Private Persons or Business.** Commenter states that there will be an increase in the amount of prisoners who seek shelter in Homeless Shelters. Therefore businesses such as grocery stores and retail stores, restaurants and medical offices will see an increase of business revenues due to more released prisoners.
- **Effects on Small Businesses.** Commenter refers to the above comment stating that the proposed regulations will have an impact on small businesses due to the prisoners who are released may have learned a viable trade and can then start their own businesses.
- **Assessment of effects on Job and/or business creation, Elimination or Expansion.** Commenter states that skilled inmates being released will fill job vacancies and allow expansion of businesses. The population increase will create greater demand for goods and services.

**Accommodation: None.**

**Response C:** The department has reviewed the Notice and is content that it complies with the required standard that is set in Government Code 11346.5.

## **Commenter #9**

**Comment A:** Commenter states that proposed Section 3000, specifically the definition of Controlled Substance is problematic due to the unavailability of the Health and Safety Code to inmates and staff in general. According to the commenter this information would likely only be found in the Institution's Law Library.

**Accommodation: None.**

**Response A:** The department contends that this information is readily accessible to staff members via internet or hard copy and to inmates in areas inside the institution. This information is available in the inmate Law Library which is accessible to all inmates in the institution regardless of housing assignment as mandated in CCR Section 3120. The inmate Law Library contains legal materials to provide inmates with meaningful access to the courts (Title 15, Section 3122). Current collections include Wests Annotated California Code and Deering's California Code; and digests.

**Comment B:** The commenter states that proposed section 3000, specifically Exceptional Circumstances, is totally unacceptable. According to the commenter this definition is vague in that it would allow for time constraints to be totally disregarded for any reason. Commenter states that it will be difficult for the inmate population to know when the term Exceptional Circumstance is appropriate. Commenter further contends that this proposed definition is "totally unfair" in that the inmate may be pending release from Administrative Segregation Unit (ASU) once the Rules Violation Report is adjudicated.

**Accommodation: None.**

**Response B:** The department points out that Exceptional Circumstances as defined in the proposed regulations is not only used to suspend time frames if staff is unavailable for the reasons listed but to suspends time frames if the inmate is deemed unavailable due to circumstances listed here. This suspension of time frames will not be for an indefinite period of time in that all Rules Violation Reports must be adjudicated in order to close Official Disciplinary Logs that are audited frequently. The department further contends that retaining an inmate in ASU pending the outcome of a CDC 115 is reviewed and completed by a Classification Committee who has the duty to consider the totality of circumstances and make appropriate decisions for the fundamental fairness to the inmate in keeping with the safety of the inmate, staff and institution as a whole.

**Comment C:** The commenter states that the definition for Disciplinary Free Period contained in proposed Section 3000 should contain the language that if a Rules Violation Report is ordered re-issued and re-heard the original date and time of identification still applies.

**Accommodation: None.**

**Response C:** The department points out that proposed new section 3320(a)(2) designates that the time constraints for a re-issued Rules Violation Report will begin on the date the Chief Disciplinary Officer orders the re-hearing pursuant to section 3320(a)(1). This language will give staff clear direction in the time constraints and uphold and protect the charged inmate's due process rights.

**Comment D:** The commenter contends that section 3005(c)(3) is not clear in that the term Unlawful Assembly is vague. According to the commenter this term should be spelled out in more detail to guard against this term being abused.

**Accommodation: None.**

**Response D:** The department disagrees and points out that the Penal Code section 407 clearly defines the term Unlawful Assembly as "whenever two or more persons assemble together to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an

unlawful assembly". Additionally this information in the Penal Code is included in training for staff and can be found in the law library which is accessible for inmates regardless of housing assignment.

**Comment E:** Commenter contends that the term "trained personnel" used in Section 3290 is vague. According to the commenter this term could mean any staff that has read an "In service training handout" would meet this standard. Commenter states that this should be accredited training or on-sight training.

**Accommodation: None.**

**Response E:** The department contends that staff who have been trained through "In-Service Training or On-the-Job Training" to be certified in the testing. The documentation of that training is placed in the official In-Service Training file of the staff member and is sufficient evidence to support the testing criteria and outcomes.

**Comment F:** Commenter states that section 3314(a)(2)(F) is too vague in that the term "continue to meet program expectations" could be misinterpreted and applied differently due to no clear meaning of the term.

**Accommodation: None.**

**Response F:** The department points out that this particular language excludes continued failure to meet program expectations from being classified as an Administrative Rules Violation. An inmate who continuously fails to meet program expectations would be deemed a Program Failure as clearly defined in current Section 3000.

**Comment G:** Commenter states that section 3315(d)(1)(A) is unacceptable in that it would leave the option open to assign an Investigative Employee whenever one felt like it. According to the commenter this language would remove necessary time constraints.

**Accommodation: None.**

**Response G:** The department points out that this change was needed to give staff a reasonable time frame for the assignment of the Investigative Employee. Inmate disciplinary processes have established time constraints. In order to bring the matter to a close within these time frames the Investigative Employees report will need to be assigned early on in the process. However previous language referencing one working day was an unrealistic time frame.

**Comment H:** The commenter states that proposed section 3315(d)(1)(D) is unacceptable in that it is unfair to force inmates to object in writing to an assigned Investigative Employee. According to the commenter many inmates are illiterate, non-English speaking or unable to articulate their concerns. The commenter further contends that it is difficult to communicate their objection to the classifying official due to the inadequacies of the mail system in the institutions.

**Accommodation: None.**

**Response H:** The department contends that if the inmate being charged has any of the issues commenter refers to, such as non-English speaking, illiterate, or unable to comprehend the issues, the Department will recognize that "effective communication", as defined in proposed CCR Section 3000, may be needed, and will assign assistance to the inmate in accordance to CCR Section 3318. In response to the commenter's concerns regarding the inadequacies of the institution mail systems, the department contends that if the inmate is unable to reach the classifying official by institutional mail the inmate has a right to present that argument at the disciplinary hearing and all evidence will be considered by the hearing official.

**Comment I:** The commenter states that proposed section 3315(d)(2)(B) is acceptable as long as it does not exceed time limits allotted for the disciplinary hearing.

**Accommodation: None.**

**Response I:** The department agrees and employs an elaborate system in order to ensure that time constraints are met as an integral part of upholding the due process of inmates facing disciplinary action.

**Comment J:** The commenter contends that proposed section 3315(e)(4) is unacceptable in that the department does not have the authorization to circumvent the case law that states a defendant is entitled to face their accuser in a tribunal or a court of law. Commenter states that the use of a speaker phone to conduct hearings violates this case law.

**Accommodation: None.**

**Response J:** The department contends that existing section 3315(e) Witnesses, identifies the reporting employee as a witness. Existing regulatory language states that the reporting employee shall attend the disciplinary hearing if requested by the inmate, but does not mandate that it be physical attendance.

It is the department's contention that existing section 3315(e)(6), which states, "Nothing in this section shall preclude making a witness available by telephone for a disciplinary hearing" also applies to the reporting employee. However the department seeks to standardize disciplinary processes and to that end has added the additional requirement that if the telephone is used during the disciplinary hearing, it must have speaker capabilities. This regulatory change will ensure that a telephonic appearance is not sufficient unless the inmate is able to hear all testimony from the reporting employee via the speakerphone. This requirement will ensure that the accused is privy to all conversation. Additionally, the CDCR Disciplinary hearing is an Administrative Hearing process and not a tribunal or court of law, and therefore is not subject to all the same requirements.

**Comment K:** The commenter contends that section 3315(e)(5) is not reasonable in that the Senior Hearing Officer (SHO) arbitrarily denies questions submitted by inmates, to be asked of witnesses. Commenter further contends that the SHO should be allowed to screen questions. However if the question is denied the SHO should be obligated to explain why.

**Accommodation: None.**

**Response K:** The department contends that in order to maintain the integrity of the hearing and to remain in scope of the specific rules violation report the SHO will screen questions and determine if the possible responses to the questions will enhance his/her abilities to reach an appropriate determination and adjudication.

**Comment L:** The commenter states that Section 3315(f)(5)(I) is not justified in that medication should also be exempted as it relates to visiting restrictions. Commenter further states that visitors should not be punished for the alcohol or medication problem the inmate has away from visiting.

**Accommodation: None.**

**Response L:** It is not the intention of the department to "punish visitors" for the actions of the inmates they visit. However the department has a responsibility to maintain a positive and safe visiting environment. Inmates who violate the rules regarding the possession of controlled substances as defined in CCR Section 3000 and further listed in CCR Section 3016 are not only a potential hazard to a safe visiting environment but are responsible for any negative impact upon their approved visitors brought on by their own actions. In addition, most inmates can work off visiting restrictions through good, discipline-free behavior.

**Comment M:** Commenter contends that new Section 3320(a)(2) should indicate time constraints for receiving back time credits impacted by a re-issued RVR.

**Accommodation: None.**

**Response M:** The department points out that this amended language speaks to the commencement date of the time constraints for a re-issued RVR and does not speak to the time credits denied or forfeited as this is a separate process based on the adjudication of the RVR.

**Comment N:** Commenter contends that 3320(b) is totally unreasonable because “exceptional circumstances” is vague and is further subject to abuse by staff members. The commenter states that if an inmate is waiting an outcome of a hearing in which his/her privileges, housing or other issues are pending this regulatory language could be used as a loophole by staff members.

**Accommodation: None.**

**Response N:** The department employs an elaborate system in order to ensure that time constraints are met as an integral part of upholding the due process rights of inmates facing disciplinary action. Additionally, all Rules Violation Reports must be adjudicated in order to close Official Disciplinary Logs that are audited frequently.

**Comment O:** Commenter contends that 3320(f)(3) is totally unacceptable for the same reason as noted for 3320(b). According to the commenter, the term “exceptional circumstances” is vague and subject to abuse by staff members. The commenter states that the department has a long history of using loopholes to cover up exceeding time limits on Rules Violation Reports.

**Accommodation: None.**

**Response O: See Response N, this commenter.**

**Comment P:** Commenter contends that Section 3323(h)(4) should include a dollar amount of the property in question because simple acquisition of personal property is not a crime. Commenter gives the example that if one inmate gives another a pair of tennis shoes it should not warrant a serious RVR.

**Accommodation: None.**

**Response P:** The department points out that Section 3323(h)(4) lists “Unauthorized Acquisition”. Further, in response to request that there should be a dollar amount placed on this section, the department points out that all exchange of personal property between inmates is a violation of the regulations regardless of the dollar amount.

#### **Commenter #10**

**Comment A:** Commenter, who claims to represent the Men’s Advisory Committee at a CDCR Institution, states that these regulatory changes are designed specifically to implement an illegal and invasive harassment policy that deprives inmates of their due process rights. Commenter further contends that the department is attempting to reduce alcohol consumption by inmates, but does not mention this as a reason for the regulatory change. Commenter states that for brevity, the comments are lumped into two general categories. The first being: Urine Collection and Testing. According to the commenter surrender of body fluids under duress has always been recognized as an intrusive and humiliating procedure. The commenter states that for this reason laws and regulations have been enacted to ensure the collection of urine for testing is not the first choice method. Commenter contends that changes to 3290(c) and 3290(d) elevate alcohol to the same disciplinary level as a dangerous drug. Commenter further states that the regulatory changes to 3290(c) gives authority to any Correctional Officer to demand a man expose his genitals for the purpose of collecting a urine sample for an offence that is neither a Felony or Misdemeanor. According to Commenter, 3290(a) would allow the department to authorize use of any method or materials for testing for the use of alcohol. Commenter requests that the department use a less intrusive method of testing such as a breathalyzer

because, according to the commenter, a breath test could allow the department to assess credit loss where a urine test alone can not be used to assess credit loss when it is the only evidence to support a guilty finding of a Rules Violation Report as noted in 3290(e). Commenter states that the department's decision to use a urine test is for the sole purpose of the humiliation and harassment of inmates.

**Accommodation: None.**

**Response A:** The department contends that the authority to request and obtain a urine sample from an inmate falls under the Reasonable Cause standard in existing regulations. Prior regulations did not give staff the authority to secure a urine sample from an inmate who was observed and suspected of being under the influence of alcohol. Additionally the offense of being under the influence is a misdemeanor level offense for inmates as authorized by PC section 647(a) Disorderly Conduct. Also, the department is satisfied with the testing method of a urinalysis as an authorized method for detecting the use of alcohol and is not at this time interested in using any other methods of testing such as mentioned by the Commenter. The department contends that Section 3290(e) does preclude the loss of credits when the only evidence is the result of a urine test. However if the positive urine test is accompanied by a descriptive report which speaks to the inmate's impairment, such as outward signs of being under the influence of an intoxicating substance, and a thorough investigative process contained in the existing regulations regarding inmate disciplinary proceeding, such as the inmate's statement, statements of witnesses and the ability to question the reporting employee, the loss of credit is justified.

**Comment B:** Commenter states that his second general category issue is the matter of Due Process/Redress. According to the commenter the disciplinary hearing is a Quasi-Judicial fact finding proceeding. According to the commenter a number of the proposed regulatory changes remove the protections included in a judicial hearing and turn the disciplinary hearing into an empty shell devoid of fair processes. Specifically, Section 3315(d)(1)(D) states that inmates must request in writing that a new Investigative Employee be assigned before the investigation begins. Commenter contends that this completely eliminates the safeguard from conflict of interest. It is the Commenter's opinion that due to the lapse in the mail system every request for a substitution of an Investigative Employee will be received after the investigation has begun.

**Accommodation: None.**

**Response B:** The department disagrees. If the inmate requests an alternate employee be assigned and that request is approved by the classifying official, an alternate employee will be assigned. In the event that an investigation had been started by the first investigative employee, the information contained in that investigation would not be able to be used by the Hearing Official assigned to reach a disposition on the Rules Violation Report. In response to the Commenter's concerns regarding the inadequacies of the institution mail systems, the department contends that if the inmate is unable to reach the classifying official by institutional mail the inmate has a right to present that argument at the disciplinary hearing and all evidence will be considered by the hearing official.

**Comment C:** The Commenter states that Section 3315(e)(4) language allowing the reporting employee to attend the hearing via speaker phone completely eliminates what the commenter calls the confrontation rights of the inmate and eliminates the face-to-face questioning of the reporting employee. Additionally, according to the Commenter, 3315(e)(5) is then set up as a "bull's eye" in that the requirement that the Hearing Official screen all questions to ensure they are relevant to the violation, also helps to eliminate the confrontation rights of the inmate. Commenter also states that proposed section 3315(e)(6) further adds to the denial of the confrontation rights in that it allows that a witness may be interviewed via speaker phone. Commenter then gives an example of what a hearing would be like using these proposed sections. Commenter ends this comment by stating that the screening type questioning allowed by this regulatory action do not meet the legal definition of Confrontation of Witnesses as held under the California Supreme Court, Federal Courts, and the U.S.



Supreme Court who, according to the commenter, have recently ruled on the confrontation rights of inmates at disciplinary hearings.

**Accommodation: None.**

**Response C: See Commenter #9, Response J.**

**Comment D:** The Commenter reiterates that he believes the issue of urine testing is humiliating and intended to harass inmates. Commenter further contends that proposed Section 3315(f)(5)(I) allows visiting sanctions to be imposed as a result of a disposition of a violation of CCR section 3290(d), refusing to submit to a urine test. According to the Commenter, the fact that an inmate's visits can be sanctioned for refusing to submit to a urine test but cannot be sanctioned if the inmate is found to have used alcohol, as seen in this section, proves that the department's intent is to make inmates submit to a urine test. Commenter states that this makes it clear that the intent of these regulations is harassment and humiliation.

**Accommodation: None.**

**Response D:** The department contends that existing regulation Section 3315(f)(4) discusses the disposition for a violation that included an act related to the use, possession, or distribution of controlled substances, controlled medication, drugs or drug paraphernalia, or if the inmate refused to test for a controlled substance or drugs. Accordingly, proposed Section 3315(f)(5)(I) shows the sanctions for violations of possession or distribution of controlled substances which were previously mis-categorized as 3323(d)(6) instead of 3016(a). This mis-categorized language is the only language in this section amended in this regulatory action (see Initial Statement of Reasons under 3315(f)(5)(J) for explanation). The ability to sanction visiting is original regulatory language that was adopted in accordance with the Administrative Procedures Act in a previous and unrelated rulemaking action.

#### **Commenter #11**

**Comment A:** Commenter states that the proposed definition of 'Drug Paraphernalia in Section 3000 uses the word 'paraphernalia' to describe drug paraphernalia which, according to the commenter, makes no sense whatsoever.

**Accommodation: None.**

**Response A:** The department points out that the word paraphernalia is defined in a dictionary as: "equipment, apparatus, or furnishing used in or necessary for a particular activity". The department contends that including this term aids in the overall definition of Drug Paraphernalia, along with device, contrivance and instrument. We trust the commenter understands the fact that any device used to deliver unauthorized drugs to a user can fall under this definition.

**Comment B:** Commenter states that the definition for Exceptional Circumstances should include vacation, detached duty, and extended sick leave because these are legitimate reasons an employee may be away from the institution. Commenter further points out that neither current or proposed regulations give direction to staff as to what should happen to a Rules Violation Report when the reporting employee is no longer employed, or is a contractor to the department.

**Accommodation: None.**

**Response B:** The department points out that the definition in Section 3000 is not meant to be an exhaustive list of circumstances, but a list of examples as to what set of circumstances shall be deemed an exceptional circumstances. Any attempt to list every possible scenario that could take place would be in vain.

**Comment C:** The Commenter states that Section 3009 includes the term 'bookmaking' and further suggests the department should include a definition of bookmaking in Section 3000.

**Accommodation: None.**

**Response C:** The department contends that the term 'bookmaking' is original regulatory language that was adopted in accordance with the Administrative Procedures Act in a previous and unrelated rulemaking action.

**Comment D:** Commenter points out that the letter 'e' on the word substance appears to be included in the strike out language and should be corrected.

**Accommodation: None.**

**Response D:** The department points out that the text submitted for final approval to the Office of Administrative Law is submitted in a strike through/underline format and any typographical errors are corrected prior to printing.

**Comment E:** The Commenter points out another possible typographical error in section 3315(a)(3)(B) that appears needs correcting.

**Accommodation: None.**

**Response E:** The department points out that the text submitted for final approval to the Office of Administrative Law is submitted in a strike through/underline format and any typographical errors are corrected during the review process.

**Comment F:** The Commenter contends that Section 3315(a)(3)(F) should include the word "any" in the verbiage between the words "or" and "Alcoholic beverages". Commenter contends that the current proposed language could lead to a successful legal argument that if a test result came back as positive for only one of the items included in this list a guilty finding of a Rules Violation Report could not be reached.

**Accommodation: None.**

**Response F:** The department disagrees and contends that the presence of the word "or" is sufficient to draw the reader to the conclusion that the items in this list can be singular.

**Comment G:** Commenter contends that the word "a" should be changed to "an" in the first sentence of section 3315(d)(1)(B).

**Accommodation: Yes.**

**Response G:** The department agrees and has made the non-substantive correction.

**Comment H:** Commenter points out a possible extra space in the section language and suggests deleting the space.

**Accommodation: Yes.**

**Response H:** The department has made the non-substantive correction.

**Comment I:** Commenter makes a grammar suggestion regarding the order in which the reference to section 3016(a) and 3016(c) are listed.

**Accommodation: Yes.**

**Response I:** The department agrees and has made the change so that the citations are sequential.

**Comment J:** Commenter contends that Section 3315(f)(5)(J) is not specific in that the reference to the requirement that an inmate attend Alcoholics Anonymous or Narcotics Anonymous does not give specific direction as to how many meetings the inmate must attend to satisfy this requirement.

**Accommodation: None.**

**Response J:** The department contends that this specific language is original regulatory language that was adopted in accordance with the Administrative Procedures Act in a previous and unrelated rulemaking action.

**Comment K:** Commenter contends that section 3320(a) should include a reference to the CDC 1030 Form if confidential information is used in the disciplinary process.

**Accommodation: None.**

**Response K:** The department contends that direction concerning the use and issuance of the CDC 1030 Form is included in 3320(c)(1). The department contends that this language is sufficient and located correctly within existing regulations.

**Comment L:** Commenter suggests that a 'space' be added after the letter (2) and the word "Assault" in section 3323(d)(2).

**Accommodation: Yes.**

**Response L:** The department has made the non-substantive correction.

**Comment M:** Commenter contends that the word "a" should be changed to "an" in section 3323(f)(12).

**Accommodation: Yes.**

**Response M:** The department agrees and has made the non-substantive correction.

### **15 DAY RE-NOTICE COMMENTS:**

The public comment period for the 15 Day Notice of Change to Text commenced on October 12, 2007, and ended on November 1, 2007.

### **SUMMARIES AND RESPONSES TO 15 DAY RE-NOTICE:**

There were no public comments submitted during the 15 day re-notice.

### **2<sup>ND</sup> 15 DAY RE-NOTICE COMMENTS:**

The public comment period for the 2<sup>nd</sup> 15 Day Notice of Change to Text commenced on June 5, 2008, and ended on June 20, 2008.

### **SUMMARIES AND RESPONSES TO 2<sup>ND</sup> 15 DAY RE-NOTICE:**

There were no public comments submitted during the 2<sup>nd</sup> 15 day re-notice.